IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. [illegible]

MARIAN HEIDEMAN,

Petitioner,

vs.

WILLARD V. KELSEY, as Executor of the Will of CHARLES AVERY HILLIARD, FRANK WYMAN HILLIARD, LEAH HILLIARD and GLADYS H. GATES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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THE OPINIONS BELOW.

There are three successive opinions of the Supreme Court of Illinois in this case. The opinion of which review is sought is not yet officially reported. It appears in 166 N. E. (2d), Advance Sheet 4, at p. 506. It is reprinted in full as Appendix I to this petition.

The two earlier opinions appear as *Heideman* v. *Kelsey*, 414 Ill. 453, 111 N. E. (2d) 538, reprinted in full as Ap-

pendix II to this petition and 7 Ill. (2d) 601, 131 N. E. (2d), reprinted as Appendix III to this petition.

There were no opinions of the trial court, the Circuit Court of Macoupin County court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The Date Of The Judgment Sought To Be Reviewed.

The judgment of the Supreme Court of Illinois sought to be reviewed was May 16, 1960.

The Date Of The Order Denying Rehearing.

A petition for rehearing, timely filed, was denied May 16, 1960.

The Statutory Provision Conferring This Court's Jurisdiction To Review On Certiorari The Judgment Of The Supreme Court of Illinois.

This court's jurisdiction of this case on certiorari is conferred by Section 1257 of the Judicial Code (U. S. C., Title 28, Sec. 1257), which provides for *certiorari*.

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (par. 3) by writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

The Question Presented For Review.

The question presented for review is:

> DID THE SUPREME COURT OF ILLINOIS DENY PETITIONER DUE PROCESS OF LAW WHEN, HAVING REVERSED IN TWO SUCCESSIVE OPINIONS TWO VERDICTS IN HER FAVOR AS THE CONTESTANT OF THE WILL OF HER FATHER, IT REVERSED A THIRD SUCH VERDICT IN

HER FAVOR WITHOUT EITHER REMANDING THE CAUSE FOR A NEW TRIAL OR ITSELF MAKING AN INDEPENDENT FINDING THAT THE WILL WAS VALID, BUT RECOGNIZED IN THIS VERY CASE, AS IT HAS CONSISTENTLY ANNOUNCED THROUGHOUT ITS HISTORY, THAT IT HAS NO JURISDICTION TO SUBSTITUTE ITS JUDGMENT FOR THAT OF A JURY WHERE THE EVIDENCE IS IN SUBSTANTIAL CONFLICT, PETITIONER HAVING BEEN THUS DEPRIVED OF HER CLAIM TO HER FATHER'S ESTATE WITH NO FINDING OF FACT BY ANY COURT ADVERSE TO THOSE CLAIMS?

THE FEDERAL CONSTITUTIONAL PROVISION AND STATE STATUTES WHICH THIS CASE INVOLVES.

The Fourteenth Amendment to the Constitution of the United States, " . . nor shall any State deprive any person of . . . property without due process of law".

Illinois Constitutional Question Involved.

Illinois' Constitution of 1870, Article II, Section 5, provides:

> "The right of trial by jury as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace by a jury of less than 12 men, may be authorized by law."

Statute Of Illinois Law Involved.

This case involves Section 92(3)(b) of the Illinois Civil Practice Act, (Ill. Rev. Stats., 1959, Ch. 110, par. 92(3) (b)) (Ill. Rev. Stats. Ch. 110, par. 92 (3) (b), Vol. 2, p. 1003):

> "(b) Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case: Provided, that, except as to equitable issues, the Supreme Court shall reexamine cases brought to it by appeal from the Appellate Courts, as to questions of law only."

STATEMENT OF THE CASE.

All of the facts upon which petitioner relies for review and reversal of the judgment of the Supreme Court of Illinois appear in that court's third and final opinion, Appendix I, *post*. All quotations in this Statement of the Case are from that opinion unless the contrary is indicated.

Petitioner, the only child and sole heir of Charles Avery Hilliard, filed this suit in the Circuit Court of Macoupin County to contest her father's last will, by which she was bequeathed only one-sixth of her father's personal estate. If the will was invalid, petitioner, as his only child and sole heir, was entitled to the whole of his estate under the Illinois law of testate succession, there being extant, so far as is known, no other will of the testator (Ill. Rev. Stats., 1959, Ch. 3, par. 162, subparagraph Second, Vol. 1, p. 34).

Petitioner's claim was that her father was without adequate testamentary capacity at the time that the will was executed. As appears from the third opinion of the Supreme Court of Illinois, there was a dispute of fact as to whether Hilliard's will was executed on January 10, 1950, there being a debate in the evidence as to whether Hilliard was sane on that day, or was executed at some time after April 1, 1950, at which time it was admitted that Hilliard's "mental power capacity and ability" had become "impaired as alleged".

Of course, we do not ask this court to canvass the voluminous record of the evidence in this case or to weigh conflicting evidence. The question presented, stated *ante*, emerges entirely from the facts narrated in the last opinion of the Supreme Court of Illinois, Appendix I, *post*.

This case has been tried four times and has resulted in three verdicts for the plaintiff and one mistrial ensuing from a divided jury.

"At the first trial, a verdict was directed for the defendants on the issue of undue influence," which issue was tried on the first trial "and only the issue of testamentary capacity was submitted to the jury, which found for the plaintiff". (*Final Opinion*, App. I, p. 15.)

"On appeal from the decree entered on that verdict," the Supreme Court of Illinois held, 414 Ill. 543, 111 N. E. (2d) 538, Appendix II, *post*, "that the testimony of Dr. Clark, one of the witnesses for the plaintiff [petitioner] warranted a submission of the cause to the jury but that the trial court erred in denying the defendant's motion for a new trial". (App. I, p. 15.) The Supreme Court of Illinois held in this first opinion that the jury's verdict was "against the manifest weight of the evidence".

By this first opinion, the Supreme Court of Illinois, recognizing and obeying a principle of Illinois appellate judicature that, as we demonstrate in the Argument, the Supreme Court of Illinois has always deemed a measure of and limitation upon its jurisdiction under Illinois' three Constitutions of 1818, 1848 and 1870, having set aside the jury's verdict, remanded the cause for a second trial.

"At the second trial the jury was unable to agree. At the third trial the jury again found for the plaintiff. On appeal [the Supreme Court of Illinois] again reversed and remanded for a new trial. (7 Ill. (2d) 601, 131 N. E. (2d) 531, App. I, p. 16).

The Supreme Court of Illinois thus summarized the essence of its second opinion in its third and final opinion:

> "The basis of this reversal was the admission of testimony of a handwriting expert to the effect that the testator's signature on the contested document had not been executed on January 10, 1950. We held that this

testimony raised an irrelevant and highly prejudicial issue not encompassed by the pleadings, which had presented only the issue of testamentary capacity. Although we found it unnecessary to set forth all the evidence presented at the third trial in view of this error, we noted that both sides relied on the same testimony used in the first trial and also produced six additional witnesses apiece, and we observed that the 'contestant's position is not greatly improved by their added proof.' 7 Ill. 2d 601, 604." (App. I, p. 16.)

The third opinion of the Supreme Court of Illinois thus continues the narrative of this litigation:

"Thereafter the plaintiff was given leave to file an amended complaint which included a new count alleging that the contested document was not executed on January 10, 1950, but instead was signed by the testator after April 1, 1950, at which time the testator was insane and without testamentary capacity. The defendants' answer denied the allegations concerning the date of execution of the will, but admitted that 'sometime after March 1, 1950, and before some time in April, 1950, the mental power, capacity and ability of said deceased became impaired as alleged.'

"At the trial now before us the issue raised by the new count and the issue of testamentary capacity were submitted to the jury which returned a general verdict for the plaintiff. In addition, in response to three special interrogatories, the jury found that Charles Avery Hilliard was not possessed of sufficient mental capacity to transact ordinary business on January 10, 1950, and that the document offered as his last will and testament was not executed by him on that date, but instead was signed by Hilliard after April 16, 1950, at a time when it was conceded he was without testamentary capacity."

Thus it will be noted that this case, tried to four juries, resulted in three verdicts for petitioner and one divided jury.

In its third and final opinion, the Supreme Court of Illinois undertakes a discussion, analysis and dissection of the evidence in the third trial, with reference to the evidence at the former trials resulting in juries' verdicts and reversal on appeal.

The essence of this analysis of the evidence is *not* a finding by the Supreme Court of Illinois that petitioner's father was mentally competent to execute the will assailed in this case and that therefore it was invalid. Such a finding, if deliberately made by Illinois' highest court, even though it was contrary to three successive verdicts in petitioner's favor, would not raise a question of Federal due process.

Instead of finding the testator to be competent to execute the will in question and declaring that will to be valid, the Supreme Court of Illinois, having found that the testimony of one Swett, a handwriting expert who testified for plaintiff, and one Dr. Smith, a physician who testified in her behalf, were not competent to show that the will was executed "some time in April 1950," at which time it was admitted that the testator lacked testamentary capacity, said (App. I, p. 21):

> "The plaintiff has had four trials and over eight years in which to produce a convincing case. The resourcefulness of her attorneys in exploring new theories has produced only the unsatisfactory expert testimony of Dr. Smith and of Swett. She has failed to meet or surmount the defendants' strong evidence which shows that the testator could and did handle business affairs and plan the disposition of this property when his will was executed."

The court further said (App. I, p. 22):

> "It has been demonstrated that the plaintiff cannot produce sufficient evidence to sustain her claim that

the testator lacked testamentary capacity, and there is no competent evidence in the record supporting her claim that the contested document was not signed on January 10, 1950, but rather at a later date when the testator was admittedly insane. Another trial would be fruitless and a waste of the court's resources as well as those of the parties. The decree will therefore be reversed."

If the language above quoted came from a State court of review that regards itself as having power to substitute its judgment on questions of fact for that of a jury in the trial court, no question of Federal due process would be raised.

But when the language above quoted is read against the background of Illinois authority in which the Supreme Court of Illinois has consistently disclaimed and disavowed upon Illinois constitutional grounds its power to substitute its judgment on contested questions of fact for that of even one jury in the lower court, it will be clear that the last opinion of the Supreme Court of Illinois could *not* have been intended to embody and declare that court's resolution of a question of fact.

What the Supreme Court of Illinois has actually done is to take away the plaintiff's three verdicts, each of which did embody findings of fact in her favor, without even claiming the power to make a final determination of those questions adverse to her.

Such a want of finding on the part of Illinois as to questions material to the plaintiff's substantive rights under Illinois law raises a question of Federal due process, which question we say should be resolved in petitioner's favor.

The Stage of the Proceedings at Which, and the Manner in Which, the Federal Question Was Raised.

Naturally, the petitioner's assertion that the last opinion of the Supreme Court of Illinois denied her due process of law because it set aside findings of a lower court without making and without having the power to make contrary findings was not raised until petitioner filed her petition for rehearing in the Supreme Court of Illinois. The question could not have been anticipated and did not arise until the Supreme Court of Illinois repudiated its two previous holdings in this very case and departed from its theretofore steadfast holdings that it could not set aside juries' verdicts on questions of the weight of the evidence without remanding for a new trial. This it did not do until it rendered its final opinion in this case.

Petitioner said at pages 4 and 5 of her petition for rehearing:

> "It is submitted that if Section 92(3)(b) can be held to permit a reviewing court to reverse a case because the jury's verdict is manifestly against the weight of the evidence without remanding it, it is unconstitutional in that it violates the Constitution of the U. S. and the Constitution of the State of Illinois; as it deprives the plaintiff of her property without due process of law, abridges her privileges and immunities and denies her the equal protection of the laws."

As we have noted, the petition for rehearing was denied without opinion. This denial necessarily embodied a rejection of petitioner's Federal constitutional argument.

ARGUMENT.

I.

The Supreme Court of Illinois did not, because that court recognizes that it could not, substitute its finding of fact upon conflicting evidence for that of a jury. Therefore the plaintiff has lost her claim to her father's estate on questions of fact resolved in her favor by three juries with no contrary finding by the Supreme Court of Illinois. Hence she has been deprived of Federal due process.

In delineating the narrow but very important question of due process propounded by the record in this case, we wish to make it clear that we do not contend that Federal due process or any other Federal constitutional provision requires a State to grant a trial by jury in any case, civil or criminal. This court has always declared the contrary. *Edwards* v. *Elliot*, 21 Wall 557. *Walker* v. *Sauvinet*, 92 U. S. 90. *Bollin* v. *Nebraska*, 176 U. S. 84.

Nor do we challenge the right of a State to permit a reviewing court to weigh conflicting evidence and to reach a conclusion of fact contrary to that reached in the lower court even where the finding in the lower court was that of a jury.

If Illinois' Supreme Court had asserted and exercised the prerogative of substituting its finding of fact for that of three juries in this case, no question of due process would be raised. But when the three opinions of the Supreme Court of Illinois in this case are read against the background of that court's own jurisprudence with respect to its lack of power to substitute its judgment for that of a jury on ques-

tions of fact, including its first two opinions in this case, it is clear that the Supreme Court of Illinois neither claimed nor exerted any such right.

The leading case in Illinois expository of the constitutional inhibition upon Illinois' reviewing courts in reviewing juries' verdicts on questions of fact is *Mirich* v. *Forschner Contracting Company*, 312 Ill. 343.

In the *Mirich* case, the Supreme Court of Illinois had occasion to consider the effect of an Illinois statutory provision then in force that permitted reviewing courts to make findings of fact contrary to the findings made by a lower court. The language of the statute was broad enough to permit such findings even though the case was tried in the lower court by an Illinois jury. But the Court held that, although the statute was constitutional as to cases tried without a jury and even as to cases tried with a jury where there was no evidence which, *standing alone* would support a jury's verdict, it could *not* be constitutionally applied in cases where a jury had reached a verdict upon conflicting evidence.

We should note, however, that Illinois has always recognized the right of reviewing courts to set aside verdicts as against the manifest weight of the evidence provided that the reviewing court does not substitute its judgment for that of a jury but *remands for a new trial*.

In the *Mirich* case, the Supreme Court of Illinois, after reviewing many of its decisions, said at page 358:

> "This being a case tried by jury,—and the evidence of plaintiff seems unquestionably to have tended to establish a cause of action,—the statute did not authorize the Appellate Court to reverse the judgment with a finding of facts *and not remand the case*. If the statute be construed to authorize the judgment of the Appellate Court in this case, it would authorize that court,

> in any case depending on facts, where the evidence was conflicting, to weigh and determine on which side is the preponderance of the testimony which that court believed, and would give that court the power to exercise the functions of a jury, which we have repeatedly held the trial court could not do, and the statute would be as much a violation of the right of trial by jury as if it had attempted to confer the same power on the trial court." (Emphasis supplied.)

That the Supreme Court of Illinois recognizes a State constitutional inhibition upon its power to make findings contrary to a jury without remanding for a new trial by jury is evinced by its two earlier decisions in this very case.

In its first opinion, *Heideman* v. *Kelsey*, 414 Ill. 453, the Supreme Court of Illinois said at page 466:

> "On a motion for new trial the court may weigh the evidence for the purpose of determining whether the verdict is contrary to the weight of the evidence, and, if the court so finds, *a new trial should be granted.*" (citing authority)

In the first opinion the court also said, at page 466:

> "It is our opinion that the proof in this case demonstrates that Hilliard was a person with adequate testamentary capacity on January 10, 1950 and the jury's finding to the contrary is against the manifest weight of the evidence."

In the first opinion, the Supreme Courts of Illinois reversed and remanded for a new trial. Had it claimed the power to substitute its judgment for the verdict of a jury without remandment, it would have exercised that power on the first appeal.

The recognition of this inhibition against reversal without remandment upon questions of weight of the evidence is, if possible, even stronger in the opinion of the Supreme

Court of Illinois in the second case, 7 Ill. 2d 601, 534, App. II *post*. The Court said (App., p. 38):

> "We are unable to agree with the defendants that this case should be reversed without remandment. *Blackhurst* v. *James*, 304 Ill. 586, 136 N. E. 754. The evidence for the plaintiff is sufficient to sustain a verdict finding the testator lacked testamentary capacity and in such state of the record the plaintiff under the statute is entitled to a trial before a jury."

It is therefore clear that the Supreme Court of Illinois did not, because under its own reading of Illinois' Constitution it could not, make a final finding of fact contrary to the jury's three verdicts.

The result is that the plaintiff has suffered the loss of her claim to her father's estate despite three verdicts sustaining that claim and with no contrary finding by any court of Illinois.

For this reason, petitioner has been deprived of her property without due process of law.

II.

This case is of sufficient moment to elicit this court's writ of certiorari.

We would not importune this court to entertain this case, important as it is to the litigants, if the question of due process did not transcend in its scope the immediate interests of the instant parties.

At stake is the question whether litigants who have prevailed in one or successive findings by lower courts may find themselves bereft of their property rights by a decision of a reviewing court which does not, because under the State Court's own reading of its own jurisdictional limitations it cannot, substitute its findings for those which it supersedes.

PRAYER FOR THE WRIT OF CERTIORARI.

For the reasons suggested in this petition, petitioner seeks this court's writ of certiorari to review and reverse the judgment of the Supreme Court of Illinois in this case.

Respectfully submitted,

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APPENDIX I.

Docket No. 35104—Agenda 22—September, 1959.
Marian Heideman, Appellee, v. Willard V. Kelsey, Exr., *et al.*, Appellants.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

This is an action to set aside a document dated January 10, 1950, which had been admitted to probate as the last will and testament of Charles Avery Hilliard. The plaintiff is Marian Heideman, the only child and sole heir of the testator, who was bequeathed one-sixth of the testator's personal estate under the will. The defendants are Willard V. Kelsey, the executor, and Frank Wyman Hilliard, Leah Hilliard and Gladys H. Gates, the surviving brother and sisters of the testator, who are also beneficiaries under his will. The jury found that the contested document was not the testator's will and the trial court entered judgment on the verdict. The defendants have appealed directly to this court. The testator owned a farm which he devised to his brother, and a freehold is involved.

On two previous occasions, judgments for the plaintiff in this case have been reversed and the cause has been remanded for a new trial. (*Heideman* v. *Kelsey*, 414 Ill. 453; 7 Ill. 2d 601.) Originally the plaintiff charged undue influence and lack of testamentary capacity. At the first trial, a verdict was directed for the defendants on the issue of undue influence, and only the issue of testamentary capacity was submitted to the jury, which found for the plaintiff.

On appeal from the judgment entered on that verdict, we held that the testimony of Dr. Clark, one of the witnesses for the plaintiff, warranted a submission of the cause to the jury but that the trial court erred in denying the defendants' motion for a new trial. (414 Ill. 453.) After a detailed review of the evidence presented on both sides, we concluded, "It is our opinion that the proof in this case demonstrates that Hilliard was a person with adequate testamentary capacity on January 10, 1950, and

the jury's verdict finding to the contrary is against the manifest weight of the evidence." (414 Ill. at 466.)

At the second trial the jury was unable to agree. At the third trial the jury again found for the plaintiff. On appeal we again reversed and remanded for a new trial. (7 Ill. 2d 601.) The basis of this reversal was the admission of testimony of a handwriting expert to the effect that the testator's signature on the contested document had not been executed on January 10, 1950. We held that this testimony raised an irrelevant and highly prejudicial issue not encompassed by the pleadings, which had presented only the issue of testamentary capacity. Although we found it unnecessary to set forth all the evidence presented at the third trial in view of this error, we noted that both sides relied on the same testimony used in the first trial and also produced six additional witnesses apiece, and we observed that the "contestant's position is not greatly improved by their added proof." 7 Ill. 2d 601, 604.

Thereafter the plaintiff was given leave to file an amended complaint which included a new count alleging that the contested document was not executed on January 10, 1950, but instead was signed by the testator after April 1, 1950, at which time the testator was insane and without testamentary capacity. The defendants' answer denied the allegations concerning the date of execution of the will, but admitted that "sometime after March 1, 1950, and before some time in April, 1950, the mental power, capacity and ability of said deceased became impaired as alleged."

At the trial now before us the issue raised by the new count and the issue of testamentary capacity were submitted to the jury which returned a general verdict for the plaintiff. In addition, in response to three special interrogatories the jury found that Charles Avery Hilliard was not possessed of sufficient mental capacity to transact ordinary business on January 10, 1950, and that the document offered as his last will and testament was not executed by him on that date, but instead was signed by Hilliard after April 16, 1950, at a time when it was conceded he was without testamentary capacity.

The testimony of most of the plaintiff's witnesses who testified at the first trial on the issue of testamentary capacity was put before the jury at the present trial, either

from the witness stand or by stipulation that their testimony might be read to the jury. Their earlier testimony is summarized in 414 Ill. at 456-459. The plaintiff also offered the testimony of five new witnesses on this issue. Several of them added nothing of substance to the plaintiff's case.

Dr. Joseph Ernst examined the testator on October 11, 1949, when he was admitted to Deaconess Hospital for treatment of persistent constipation. He had no present recollection of the occurrence, but from the record that he then made he testified on direct examination that the testator was vague as to his past medical history. On cross-examination he testified that the testator was alert and appeared to be a sane man. Dr. Claude Pickrell's testimony at the second and third trials was read to the jury by stipulation. He admitted the testator to Deaconess Hospital in October, 1949, and had also spoken with him several times around January 31, 1950, about the advisability of a hernia operation. He was of the opinion, based on these conversations, that the testator was of sound mind and memory on January 31, 1950. Ben Maricle, the testator's barber, stated his opinion, based on his observation of the testator's declining activity and increasing reticence, that the testator was not "of as sound a mind" in 1949 as he was previously. Anne Albro, the plaintiff's only child, testified at length as to the relationship that existed between the testator, her mother and herself, which was one of normal affection. She also testified that she visited the testator in 1946 and that when she next returned from her home in Seattle and visited him in June of 1949 he was more feeble and aged, thin and more stooped, red-eyed and haggard. He did not recognize her 3 3 4-year-old son, whom he had not seen for three years. She "didn't think that he was of sound mind and memory that day."

More important is the testimony of Dr. Groves B. Smith, a physician and surgeon specializing in nervous and mental diseases. In response to a hypothetical question the doctor gave his opinion that the man described in the hypothetical question had advanced arteriosclerotic degeneration, both physical and mental, and was not of sound and disposing mind and memory on January 10, 1950. His testimony was in some measure based upon the behavior and

medical condition of the hypothetical man, particularly his longstanding and advanced arteriosclerosis. His opinion was also influenced, however, by his conclusion that the man who signed his name in a cramped and jerky manner to the contested document of January 10, 1950, could not have been of sound mind.

This new testimony does not strengthen plaintiff's case upon the issue of testamentary capacity. It was Dr. Ernst's opinion that the testator was alert and was a sane man in October of 1949. Dr. Pickrell testified that the testator was of sound mind on January 31, 1950. The factual foundations upon which Maricle and Anne Albro based their contrary opinions were meager, and so their opinions were of little probative value. Indeed, Maricle's conclusion that in 1949 the testator was not "of as sound a mind as he was before" was of no value in determining the testator's capacity. Dr. Smith testified on cross-examination that he regarded himself as an advocate. His conclusions were based upon a hypothetical question that omitted many facts that had already been developed, as well as uncontroverted facts later developed by the defendants' evidence which tended to establish the testator's testamentary capacity during the period in which he signed the will. And his assertion that the testator's mental capacity could be determined by an examination of his signature on the contested document must be weighed against the subsequent testimony of Dr. Val Satterfield, a distinguished psychiatrist, that there is no relation, in medicine and psychiatry, between the handwriting of a person and his mental condition.

Dr. Clark was the witness whose testimony at the first trial was held to be sufficient, standing alone, to prevent a directed verdict for defendant. His testimony then is difficult to reconcile with his testimony at the present trial. At the first trial he testified that the testator suffered from brain disease caused by arteriosclerosis, or hardening of the arteries. At the present trial he testified that there had been a change in medical opinion during the intervening years; and although he testified that the testator "had a mental condition," he was unable to say that it was caused by arteriosclerosis. At the first trial he testified that the testator did not have senile dementia. (414 Ill. at 456.) At the present trial he testified that in 1948 the testator suffered from early senile dementia. On cross-examination

he enumerated the "classical symptoms" of senile dementia, but he was not able to associate these classical symptoms with significant conduct of the testator.

For reasons that will be stated, it is not necessary to determine whether or not the testimony of Dr. Smith and Dr. Clark at the present trial was sufficient to establish a *prima facie* case for the plaintiff on the issue of testamentary capacity.

While the plaintiff did not notably strengthen her case in this retrial of the testamentary capacity issue, the defendants did. They introduced in evidence additional letters regarding his will which the testator wrote to his lawyer during the latter part of 1949 and in January, 1950. These letters, with those previously introduced at the earlier trial, show that the testator at that time was able to and did in fact deliberate at length and with understanding upon the problems of drafting a will. The defendants also offered testimony of the lawyer's secretary to show that the contested document incorporated the plan developed in this correspondence. In addition, they offered additional testimony tending to show that the testator retained the capacity to understand and manage his business affairs when the will was signed. Although we are reluctant to disturb findings in which three juries have concurred, we must conclude that the jury's determination that the testator lacked testamentary capacity is against the manifest weight of the evidence and can not stand.

The only evidence supporting the plaintiff's contention that the contested document was not signed on January 10, 1950, but rather at some time after April 1, 1950, when the testator was admittedly incompetent, is the testimony of George Swett, a handwriting expert, and of Dr. Smith. Swett testified that in his opinion the testator's signatures on page one and page two of the contested document were executed at a time closer to April 25, 1950, than to January 10, 1950. He reached this conclusion (1) by a comparison of the signature on page one, first with seven checks written by the testator in January and then with a letter written on April 25 by the testator, and (2) by a comparison of the signature on the second page with the letter of April 25 and with the signature on the first page. Dr. Smith testified that from an inspection of signatures he was able to state that the signatures on the will were

made by a person who was physically and mentally incapable of writing a legible signature, and by one who was not competent to understand what he was signing. He also testified that in his opinion the signatures on the will were placed there at a time much closer to April 25 than to January 10.

The choice of signature specimens to be used for comparison was made by Swett. He exercised great selectivity in this choice, using only seven out of 28 checks written by the testator between October, 1949, and February, 1950, which the plaintiff had submitted to him and which were placed in evidence. In arriving at his opinion he took no account of other uncontroverted samples of the testator's handwriting executed during the period in controversy. If his theory was one of progressive deterioration in handwriting, as it seems to have been, a fair analysis of those earlier writings which showed characteristics similar to those manifested in the letter of April 25 was obviously required.

In *Jones* v. *Jones*, 406 Ill. 448, 450, this court held that expert testimony can not be allowed to prevail over the uncontradicted and unimpeached testimony of two disinterested attesting witnesses. This rule of priority for one form of testimony over another has been criticized. (McCormick on Evidence, sec. 173, n. 15.) It is unnecessary to reiterate that broad holding in this case. The propositions advanced by the witnesses are sufficiently startling to warrant scrutiny of the methods they employed, and their testimony can not survive that scrutiny.

The selectivity with which comparison specimens were chosen completely vitiates the value of Swett's testimony. A conclusion based on only a portion of the specimens available to him is at best meaningless and at worst highly prejudicial. We conclude that Swett's testimony was not competent evidence and was improperly admitted. What we have said applies equally to the testimony of Dr. Smith that the contested document was executed nearer to April 25 than to January 10. He, too, failed to take into account handwriting specimens that were inconsistent with his hypothesis. He advanced no medical authority to support his proposition that it is possible to determine the mental competence of one who signs a will, or the date

of its execution, by inspecting comparative signatures years after the event. Without the testimony of Swett and Dr. Smith, there was no evidence to support the plaintiff's charge that the contested document was not executed on January 10, 1950, and a verdict should have been directed for the defendants on that issue.

The defendants urge us to reverse without remanding for a new trial. We rejected the same contention on review of the first trial on the ground that Dr. Clark's testimony established a *prima facie* case which warranted submission to the jury. Dr. Clark's testimony at the present trial is difficult to reconcile with his earlier testimony, and he seems to have disclaimed his earlier opinion as to the testator's lack of ability to handle his business affairs when he testified, "I do not know of any basis for me to determine how he was doing with respect to his business affairs." His testimony alone is no longer sufficient, but even if it could be regarded, when coupled with that of Dr. Smith, as establishing a *prima facie* case, we are of the opinion that the cause should not be remanded.

We are reviewing not the first trial, but the fourth. To be sure, this fact has made us increasingly reluctant to set our view of the evidence against that of three juries. But it also makes us increasingly reluctant to remand the cause for another trial with the prospect that we will again be called upon to reverse a jury finding and remand for another trial. "This court recognizes the tendency of juries to look for an excuse to hold invalid a will making an unequal division of the testator's property among his children. (*Turnbull* v. *Butterfield*, 304 Ill. 454; *Freeman* v. *Easly*, 117 Ill. 317.)" *DeMarco* v. *McGill*, 402 Ill. 46, 51.

The plaintiff has had four trials and over eight years in which to produce a convincing case. The resourcefulness of her attorneys in exploring new theories has produced only the unsatisfactory expert testimony of Dr. Smith and of Swett. She has failed to meet or surmount the defendants' strong evidence which shows that the testator could and did handle business affairs and plan the disposition of this property when his will was executed.

This court faced a similar situation in *Graham* v. *Deaterman*, 244 Ill. 124. Three juries in three successive trials had there found that the contested document was not the

testator's last will and testament because he lacked testamentary capacity. This court reversed judgments entered on the first two verdicts and remanded for new trials on the grounds that the verdicts were against the weight of the evidence. The plaintiff's evidence consisted primarily of nonexpert opinions that the testator was not of sound mind and could not transact ordinary business affairs. At the third trial, this evidence was repeated along with new testimony of a doctor, who had seen the testator frequently and had also treated him professionally eight years before his death, that the testator was suffering from senile dementia, or softening of the brain due to old age. After considering all the evidence, the court concluded that the plaintiff could not be expected to produce any substantial new evidence and that the interests of neither party would be served by again remanding the cause for another new trial.

The same is true of the case now before us. It has been demonstrated that the plaintiff cannot produce sufficient evidence to sustain her claim that the testator lacked testamentary capacity, and there is no competent evidence in the record supporting her claim that the contested document was not signed on January 10, 1950, but rather at a later date when the testator was admittedly insane. Another trial would be fruitless and a waste of the court's resources as well as those of the parties. The judgment will therefore be reversed.

Judgment reversed.

APPENDIX II.

Marian Heideman, Appellee, *vs.* Willard V. Kelsey, Exr., *et al.*, Appellants, 414 Ill. 453.

Mr. Justice Bristow delivered the opinion of the court:

This appeal arrives here from the circuit court of Macoupin County, wherein a decree was entered pursuant to a jury verdict setting aside the last will and testament of Charles Avery Hilliard. The sole appellee is Marian Heideman, whom we will hereafter refer to as plaintiff, and the appellants are the decedent's brother, two sisters and Willard V. Kelsey, executor of the will in contest, whom we shall call defendants.

The testator, Charles Avery Hilliard, departed this life on June 7, 1950, at the age of 85. He left surviving his daughter, Marian Heideman, a brother, Frank Wyman Hilliard, and two sisters, Leah Hilliard and Gladys H. Gates. By the terms of the will, Frank Wyman Hilliard was devised all real estate, consisting of a farm, and all the farm equipment, machinery and tools used in connection therewith. The residue of his estate was divided into six equal parts, and was disposed of as follows: two parts to Frank Wyman Hilliard, two parts to his sister Leah Hilliard, one each to his sister Gladys H. Gates and his daughter, the plaintiff. The record contains very little about the family relation, and particularly is it silent with reference to any reason the testator might have had for leaving his only child just a minor share of his estate.

The complaint in this proceeding contained two counts, one charging mental incapacity, and the other undue influence. The court ruled that there was no proof in support of count II, and it was withdrawn from the jury's consideration. No quarrel is presented here by appellee concerning this determination. The jury found upon the single issue presented to it that the will in question was not the last will and testament of Charles Avery Hilliard. The trial court overruled defendants' motions for judgment notwithstanding the verdict and for a new trial. This appeal challenges the correctness of those two rulings.

The testator spent most of his life on his farm, which is located about two miles east of Brighton, Macoupin County. During the latter years his sister Leah Hilliard lived with him. In the early part of October, 1949, Hilliard and his sister Leah went to live in St. Louis, Missouri. While there, he entered the Deaconness Hospital October 11, 1949, and was discharged therefrom October 21, 1949. He and his sister then went to live in an apartment at the Gatesworth Hotel residing there until April 16, 1950. Again he entered the Deaconness Hospital, and thereafter, on April 22, 1950, he entered Maplewood Nursing Home, where he was a patient until his death on June 7, 1950.

In addition to his interests in farming, Hilliard was the president of the First National Bank of Brighton, for seventeen years. In that capacity, however, he did not manage or direct the banking business, but regularly attended and presided at all bank meetings. He engaged, for himself, very extensively in the purchase and sale of stocks, bonds and securities generally classified as gilt-edged and safe. For a man of his years, Hilliard was very active; however, he did suffer some disability, such as poor vision, which caused him to discontinue driving his car the last five years. In 1945, he fell out of a peach tree and some of his friends thought that they noticed a diminution of his physical vigor and sociability after that.

A decision of the issues presented on this review demands that we detail and weigh the evidence pertaining to Hilliard's condition on January 10, 1950, the date of the execution of the purported last will. The plaintiff relies very strongly upon the testimony of Dr. J. Fred W. Clark, who treated Mr. Hilliard from 1935 to March 1, 1948. Dr. Clarence E. Mueller was testator's attending physician from October, 1949, to the date of his death. Both doctors agree that he was suffering from constipation and arteriosclerosis. They disagree, however, on the question as to how much damage these ailments did to testator's mental condition. Although Dr. Clark did not see the testator after March 1, 1948, he was definitely of the opinion that Charles G. Hilliard did not have sufficient mental capacity to transact ordinary business on January 10, 1950. This opinion was predicated upon the following factual history: Testator, in 1947, was worried about the infrequency of his bowel movements; he was frequently mistaken about

simple matters, such as his age, or when his bowels had last moved, or the date of the removal of his teeth; he was confused and apprehensive, but witness admitted that he was oriented as to time, place and persons; he was unable to take care of his medicine; his mental sickness was described as a one-track mind; he was a feeble and confused old gentleman; he was childish and incompetent to handle any business affairs and should always be attended by someone to look after him; the symptoms of brain disease caused by hardening of the arteries present in Hilliard were forgetfulness, headaches and blurred vision. Dr. Clark admitted that testator did not have senile dementia; that he had no hallucinations or delusions, nor was unduly suspicious of anyone; and that it was his opinion he was "simply not competent to transact ordinary business."

In the light of the foregoing testimony we are required to rule adversely to defendants' contention that it was error for the trial court to refuse to enter judgment notwithstanding the verdict. It is our opinion that the testimony of Clark makes it a *prima facie* case, sufficient in itself to warrant the trial court submitting the cause of mental incapacity to the jury. The motion for a directed verdict and the motion for judgment notwithstanding the verdict present a question of law as to whether, when all of the evidence is considered, together with all reasonable inference from it in its aspect most favorable to the party against whom the motion is directed, there is a total failure or lack of evidence to prove any necessary element of the plaintiff's case or the defendants' defense. *Tidholm* v. *Tidholm*, 391 Ill. 19; *Hughes* v. *Bandy*, 404 Ill. 74.

Let us now consider briefly the testimony of other witnesses appearing on behalf of the plaintiff. Jerome W. Long, an auctioneer and filling-station operator, knew the testator for 45 years. He testified that after 1945 Hilliard was in bad shape physically; that he did not seem to care to talk as he had before that date; that in the summer of 1949 he saw the testator in a store and testator informed him that he, Hilliard, was "no good" and walked out forgetting to get a loaf of bread; that in 1945 or 1946 he asked about a cattle sale and before witness had finished telling him what the cattle had averaged, he asked about

the price of hay or grain; and that in his opinion the testator was insane in the summer and fall of 1949.

Martin Bloomstein, a mechanic, who knew testator for 35 years, testified that the older he got the more slovenly he got; that in August, 1949, he was not neat or clean like he used to be, and the front of his clothes were "slobbered up." He had no opinion as to the testator's mental capacity.

John L. Ash, a rural mail carrier, knew testator for 40 years. He observed that in the early years when Hilliard came to town he would be pretty well dressed and cleaned up, but in later years these habits began to change and his clothes were baggy in the back and dirty, and his face and hands were dirty; that in March, 1949, testator failed to recognize him in front of the telephone office in Brighton, and thought he was Dr. Ash, witness's father, who had been dead ten or eleven years; that he saw him about a week after that conversation in front of the harness shop in Brighton, and that testator knew him and asked him to come out to his farm and hunt coons which were very destructive; that there was nothing in the last conversation he had with testator that would make him question his mental capacity.

Arvic Hastings, maintenance supervisor of an aviation company, met testator in 1940 when he went to testator's farm to install a saw and saw wood. At that time the testator helped him saw wood, and in 1947 he took some lumber to testator's farm to store, and testator showed him where he wanted it put. In the same year he cut some poles in testator's pasture, and he went with him and pointed out the trees he wanted cut. In the latter part of 1947 he was at testator's farm to install a different motor on the wood saw, and the testator indicated a bunch of old fence posts, limbs and other stuff piled up by the trees that he wanted cut. One time when he saw the testator in 1948 he reported that he was not feeling well. In 1949 he seemed strong for his age, but in 1947 he appeared much weaker. This witness had no opinion about testator's mental capacity.

William Hare encountered testator on two occasions in 1945 when he was installing a telephone line for him. He testified that on the second occasion he borrowed a gun from him for the purpose of hunting; that after he had

gone a short distance from the house he returned realizing that he did not have a hunting license; that the testator asked him who he was and what he was doing there, and when he told him it more or less settled the matter. He did not think the testator had good vision, and thought that was possibly the reason why he did not recognize him. This witness expressed no opinion as to testator's mental capacity.

Then there were three witnesses, Madeline Downen, Arnold H. Downen and Mary E. McIntyre, all of whom were associated with the Maplewood Nursing Home that testator entered on April 22, 1950. In effect, all three of these witnesses testified that the testator's physical condition was weak, and that his mental condition was not very good when he was brought into the nursing home; that his conversation was disjointed; that he later made many efforts to run away; that it was difficult for them to restrain testator; that he did not want to stay in bed and would frequently go outside in his pajamas; that he had to be fed, and he was not able to control the normal functions of his body. It is strenuously urged here that it was error for the court to admit the testimony of these three witnesses. Admittedly, they did not know Hilliard before April 22, 1950. Supporting this contention the defendants rely upon what this court said in *Knudson* v. *Knudson*, 382 Ill. 492, 46 N. E. 2d 1011: "The rule as to proof of mental competency requires that such proof, to be competent, relate to a time at or near the time of the making of the will. Evidence of mental condition at other times, unless it can be seen that it tends to establish the condition of the testator at the time the will was actually executed, is wholly inconsequential."

Although there is little, if anything, in the record that would indicate that Hilliard displayed, on January 10, 1950, any of the behavior peculiarities described by the three persons from the Maplewood Nursing Home, we are unable to say that their testimony was inadmissible, but it is of slight probative value.

The testimony adduced on behalf of the defendants is strong and convincing, and its compelling force would be demonstrated in no other way than to relate it rather fully. Dr. Clarence E. Mueller was the testator's personal phy-

sician from October 11, 1949, to the date of his death, and it was his opinion that he was of sound mind on January 10, 1950, basing his opinion upon the following facts: that Hilliard showed no evidence of being confused or disoriented; that he talked intelligently on subjects unrelated to his own personal health and medicine; that he discussed his Masonic lodge affiliation which had lasted for fifty years; he discussed frequently the extent of his farms, the size of them, the work that he had been able to do prior to coming to St. Louis, such as chopping wood, repairing fences and working on the barn; he also related his experiences as a member of the board at the bank in Brighton; his physical condition generally was good; he suffered from arteriosclerotic cardiovascular disease, which was not considered out of proportion in a man of his age; and he did not observe that the testator was short of memory or that he was unable to recall the past adequately. Dr. Mueller further observed that during the hospitalization of the testator after April 16, 1950, his mental state had changed considerably; that he was confused and disorientated very much and was very difficult to control and keep in bed; that at times he was completely out of contact with his environment and did not seem to recognize people readily; that this sudden change in his physical and mental condition was attributable to a diminished blood supply to the brain tissues and diminished potency of the arteries, both being traceable to arteriosclerosis.

Allen Jones was a tenant on testator's farm. He testified that he rented it from the testator in September, 1948, and that Hilliard drew up the lease by which he was to pay $240 a year rent, one third of the crop, and half of the hay. The house they lived in was about 100 yards northwest of the house in which the testator lived with his maiden sister, Miss Leah Hilliard. With reference to testator's activity on the farm, he testified that Hilliard advised him about which fences needed to be repaired and about the hiring of men; that he would saw wood with a hand saw, split it nearly every day, and do all of the work in connection with taking care of the yard and repairing the barn. The witness told about one occasion on which Hilliard climbed upon the roof and repaired the barn by himself. He testified that he was with him daily until he left for St. Louis in November, 1949; that he would go

to town and attend to the purchase of groceries, bank meetings, depositing checks, etc.; that his eyesight was not too good; that he was a little stooped for his age but pretty spry; that he handled his own business, drew up the lease, and collected personally what was due him from the farm. It was his opinion that the testator was able to transact business. To like effect was the testimony of Jones's wife, Audrey Jones.

D. W. Schroeder, a merchant in Brighton, had known the testator all of his life. He said the testator had done business with him; that he was a stockholder of the First National Bank in Brighton; that he saw testator there on January 10, 1950, and had a conversation with him at that time; that it was his opinion based upon business transactions and conversations he had had with him that Hilliard was capable of transacting business up to and including January 10, 1950. He further testified that for his age he thought Hilliard's physical condition was very good; that he walked about as good as anybody does; that he understood that he had trouble with his eyesight; that he had voted his stock on January 10, 1950, at the stockholders' meeting; and that during the year 1949, he had occasion to interview him when he sold him some nails and some mixed clover seed; and that in 1948 or 1949 he had a discussion with him with reference to the repair of a pump.

Vernon K. Storm, who is associated with the new-business department of the St. Louis Union Trust Company, said that he first met the testator in 1948 at his home on the farm east of Brighton and at that time had a conversation with him; and that his health appeared to be very good for a man of his age. He said that he next saw Hilliard in St. Louis at the Gatesworth Hotel on December 29, 1949; that the testator had called him to talk over his various securities and said that the testator was desirous of making some small gifts that would be exempt from income tax. It was there discussed that the gift must be less than $3000, and the testator told him that he was desirous of making gifts of some stock. He recalled one that he mentioned was that of the St. Louis Union Trust Company. The witness further testified that it was his desire to have the testator nominate his trust company as an executor or trustee of his estate, and the testator replied that the company was doing business with the bank of

which he was president, and that he thought that was enough. It was witness's opinion that the testator was of sound mind, and that he was capable of transacting ordinary business in which his interests were involved.

Clark Hinderlichter, an investment man with the St. Louis Union Trust Company, had known testator over a period of years. His company had acted in an investment advisory capacity for the bank of Brighton, and he attended many of the board meetings of that bank when the testator was in attendance and presided as president. He last saw the testator on December 29, 1949, at the Gatesworth Hotel, and on this occasion the testator had a list of his securities and sought to have witness tell him about each one of them. Hinderlichter testified that Hilliard appeared to understand well the nature and extent of his holdings and was desirous of information concerning future prospects of each of them. It was the witness's opinion, based upon his conversations and observations of Hilliard, that he was capable of transacting business.

Warren G. Strohbeck had been connected with the First National Bank of Brighton for many years. He stated that during the years 1948 and 1949 he not only saw the testator at board meetings, but, on various other occasions he had an opportunity to observe and converse with him; that testator requested witness to sign his will as a witness; and that it was his opinion that the testator had the capacity to know what was his property and also who constituted the members of his family.

Gertrude Lucker was another witness to the will and is an employee, as bookkeeper, of the First National Bank of Brighton. She would see the testator in the bank frequently when he was making deposits, at which time she would have an opportunity to, and did, visit with him. It was her opinion that testator was capable of transacting his own business on January 10, 1950.

Albert H. Michenfelder testified that he was employed by Newhard Cook & Company, of St. Louis, who are members of the New York Stock Exchange; that he was a salesman whose duty it was to undertake to interest people in the purchase of investments that his company had for sale; that he became acquainted with the testator about thirty years ago and began calling at his farm for busines-

purposes around 1942, and he considered Hilliard's business a very active account; that he would see him with reference to the purchase or sale of securities at least every three months. The witness stated that there was no question but what testator understood the merits and demerits of the stocks that he owned; that he exercised the best of judgment in the buying and selling of them; that the last time he saw him was at the Gatesworth Hotel which was about six months before he passed away; and that on that occasion he appeared exceptionally alert and intelligent. It was his opinion that the testator possessed sufficient mental capacity to know the members of his family and to transact normal business.

Lloyd Weil was engaged in the trucking business and was formerly an agent of the Standard Oil Company, and since 1937 the testator had bought his tractor fuel and farm needs from him. Weil also operated the Brighton elevator, and bought nearly all the farm products Hilliard sold, and sold him limestone and fertilizer for the farm. These business transactions were between the years 1942 and 1947, and, after the latter date, Weil continued to do trucking service and carpenter work for Hilliard. His last contact with the testator was in October, 1949, when he delivered $188 worth of limestone which Hilliard bought and paid for himself. Weil also testified that he did carpenter work for him and Hilliard would direct and supervise it, and help in the measurement of the sills and the sawing of the wood; that he assisted in putting the roof on the barn; that as late as 1949 he could observe very little change in his physical condition; that his mental condition was good; and that he was capable of transacting ordinary business.

Harold C. Chase was the operator of a garage and had been acquainted with the testator all of his life. Hilliard was in the habit of stopping in his place of business every time he came to town; and each time he would have occasion to visit and converse with him rather extensively. He did some work for the testator in 1947 and 1948, and observed no change in his mental condition in the years 1948 to January 10, 1950. It was his opinion that Hilliard was capable of transacting ordinary business.

F. G. Scheffel, a resident of Brighton, engaged in the mercantile business, selling groceries, hardware, shoes and

dry goods, and also a director of the First National Bank, testified that the testator traded at his store at least once a week which, combined with the bank meetings, gave him an opportunity to see and observe the testator frequently; that he did not notice any change in his physical or mental condition in the last three years prior to January 10, 1950; that when he came in to buy groceries he would occasionally have a list, but frequently he would depend upon his memory to make his purchases. In his opinion he always knew how to handle his own business.

Maurice L. Bentley testified by deposition, which was taken at the instance of the plaintiff and read into evidence by the defendants, that he had known the testator all of his life; that he had left Brighton in 1941 and seen Hilliard only once after that time; that he saw him the last time at the Gatesworth Hotel the first Sunday in January, 1950, and that he did not notice anything unusual about the testator and was of the opinion that his mind was alert.

Defendants' exhibit No. 28 is a letter dated December 29, 1949, written by Charles A. Hilliard to Willard Kelsey, his lawyer, at Brighton, which is as follows: "I received your letter okay with a copy of proposed will. Have not had a chance to study it much yet. I want to compare it with first copy which was signed and which you have. Maybe I will be satisfied with one of them. Also please send me your bill. Date the bill 1949. I expect to come up to the meeting January 10, if weather will permit. Yours, Charles A. Hilliard."

Defendants' exhibit No. 30 is a letter dated January 5, 1950, written by Charles A. Hilliard to Willard Kelsey, Brighton, which is as follows: "I am sending one of the copies of the will you wrote for me sometime ago for some changes. I think it will be best to rewrite the first page entirely making the changes I have indicated. I expect to be in Brighton for the bank meeting on the 10th of January and you can bring it down with you and we will get it signed there. Yours truly, Charles A. Hilliard."

It will be observed that defendants' exhibit No. 28 was written only twelve days and defendants' exhibit No. 30 only five days before the execution by Hilliard of his last will. These two exhibits lend much strength to the defense in this case. They demonstrate rather conclusively that the

testator was not only capable of thinking clearly but that he was able to express himself and write with remarkable coherence and conciseness. A photostatic copy of these letters in the record reveals a neat composition with even spacing and excellent penmanship.

On a motion for new trial the court may weigh the evidence for the purpose of determining whether the verdict is contrary to the weight of the evidence, and, if the court so finds, a new trial should be granted. *Hunt* v. *Vermilion County Children's Home*, 381 Ill. 29, 44 N. E. 2d 609.

It is our opinion that the proof in this case demonstrates that Hilliard was a person with adequate testamentary capacity on January 10, 1950, and the jury's verdict finding to the contrary is against the manifest weight of the evidence. A testator has the right, if he is mentally capable, to make unequal distribution of his property among his heirs, or to give it to strangers, and the fact that there is inequality of distribution does not of itself have the effect of invalidating his will. *Quathamer* v. *Schoon*, 370 Ill. 606, 19 N. E. 2d 750.

It was error for the trial court to deny defendants' motion for new trial.

Reversed and remanded.

APPENDIX III

Marian Heideman, Appellee, *vs.* Willard V. Kelsey, Exr., *et al.*, Appellants, 7 Ill. (2d) 601.

Mr. Justice Bristow delivered the opinion of the court:

This case was before us on a former appeal reported in 414 Ill. 453, wherein we reversed a decree entered pursuant to a jury verdict setting aside the last will and testament of Charles Avery Hilliard on the ground that the verdict was contrary to the weight of the evidence. The case was remanded with directions to allow defendants' motion for a new trial. In that opinion there is a complete recital of the evidence adduced on both sides.

A second trial was had in which the jury was unable to agree and upon a third trial the jury again found for the contestant and this is an appeal from a decree of the circuit court of Macoupin County entered upon the verdict.

On this appeal three principal errors were assigned, to-wit: (1) that the trial court erred in denying defendants' motion for a new trial; (2) that the court erred in admitting improper evidence; and (3) in the giving of instructions.

On the last trial both sides relied upon the same testimony used in the first trial and each produced six additional witnesses.

Inasmuch as this cause must be reversed because of errors in the trial we deem it unnecessary to detail the testimony of the new witnesses except to make the observation that contestant's position is not greatly improved by their added proof. This case has been tried twice by a jury with the same result and two different judges have approved the verdicts. Under such circumstances reviewing courts are reluctant to reverse because of an evidentiary deficiency. *Blackhurst* v. *James*, 304 Ill. 586.

Over the objections of defendants, the testimony of George G. Swett, handwriting expert, that the signature of the testator on the first page of the will was his signature but was not, in his opinion, signed on January 10, 1950, was admitted in evidence together with plaintiff's

exhibits 41 to 50, inclusive, which were photostatic reproductions of other signatures of the testator made before and after January 10, 1950. The will in question consisted of two pages, and the proof, without contradiction, shows that the testator declared to the attesting witnesses that it was his will; that both pages were signed by him in their presence, and at his request; and that in his presence the attesting witnesses signed both pages on January 10, 1950, at the First National Bank of Brighton, Illinois.

Swett's testimony is entirely irrelevant and only served to distract the attention of the jury from the sole issue in the case and was very prejudicial. The only issue created by the pleadings was the mental capacity of the deceased at the time of the execution of the will on January 10, 1950. In a will contest the contestant will be allowed to contest the validity of the will only upon the particular grounds that are alleged in the bill. *Waters* v. *Waters*, 222 Ill. 26, 40; *Kalnis* v. *Waitek*, 347 Ill. 253, 257; *Huffman* v. *Graves*, 245 Ill. 440.

There is no allegation in the amended complaint that is a basis for invalidating the will except that the testator was not of sound mind and memory but was in his dotage and was more than 85 years of age, that his mind and memory were so impaired as to render him wholly incapable of making any just and proper disposition of his estate, and that he did not have the mental capacity, power or ability to execute said instrument.

There is no allegation in the complaint that the will was not executed on the day of its date, *viz:* January 10, 1950. The complaint avers "that Charles Avery Hilliard was the father of the plaintiff and supposedly on or about the 10th day of January, A. D. 1950 executed a certain instrument in writing purporting to be his Last Will and Testament." The word "supposedly" is synonymous and equivalent to the words "purportedly" and "allegedly." In *Smith* v. *Henline*, 174 Ill. 184, 51 N. E. 227, this court said that an instruction in a will contest referring to an instrument as the "supposed codicil" is not equivalent to telling the jury that the codicil was not the real codicil of the testator. Such use of the word casts no discredit upon its validity and is equivalent to the words "alleged codicil" and casts no more discredit upon the validity of the codicil than

to use the word "alleged" in that regard and the instruction cannot be considered to amount to a statement that the instrument is not a codicil.

In *Mossman* v. *Bostridge*, 76 Vt. 409, 57 Atl. 995, the court held that the word "supposed" as used in a plea of trespass for killing a dog, alleging that on the date of "the said supposed killing of said dog it was found by defendant hunting wild deer" is equivalent to "alleged."

There was no necessity for either the testator or the witnesses to sign the first typewritten sheet of the will, and since there was no question in the case as to the will having been executed on the date indicated on the second page of the will, the testimony of this handwriting expert was entirely irrelevant, and its tendency to confuse the issues in the mind of the jury is apparent.

After the witness Albert H. Michenfelder had qualified as a witness for the defendants he was asked this question: "Based upon your conversation with him and your years of acquaintanceship with him, do you have an opinion as to whether or not he had the mental capacity to know the value and the extent of the property he owned?" The trial court sustained an objection made by the plaintiff to that question. This was a proper question and the court should have allowed this witness to answer. *Woodruff* v. *Trustees of the University of Illinois*, 251 Ill. 48, 95 N. E. 1034; *Powell* v. *Weld*, 410 Ill. 198, 101 N. E. 2d 581.

Complaint is made of two instructions given on behalf of the plaintiff. Instruction No. 1 was as follows: "The court instructs the jury that under the pleadings of this case it is established that Marian Heideman, the contestant, is the daughter and sole heir at law of Charles Avery Hilliard." There was no issue in this case that would occasion the giving of that instruction. The complaint alleged that Marian Heideman was the daughter of the testator and the answer admitted that fact. This instruction could have had no effect upon the jury except that it was an indication by the court that the sole heir-at-law of the testator should have inherited his property. In *Miller* v. *Ahrbecker*, 320 Ill. 577, 151 N. E. 526, we held that an instruction to the jury in a will contest concerning the rights of the contestant as the legally adopted child of the testator was improper since there was no issue as to the heirship of the adopted daughter.

In this kind of case it is highly important that trial errors be reduced to a minimum. This court made the following observation in a parallel situation in *Turnbull* v. *Butterfield*, 304 Ill. 454, 137 N. E. 476: "In a will contest, where the will seems to have made an unequal division of property there is a disposition in the mind of the average juror to hold such will invalid and to look for an excuse to do so, notwithstanding the law is that the testator may make such disposition of his property as he sees fit and may bestow his bounty where he wishes. This tendency on the part of jurors runs counter to the rule of law that they have nothing to do with the equity or inequity of a will and that the children of a testator have no property rights in the parent's property. These facts make it necessary that the jury be carefully instructed on the issue of mental soundness of the testator where such a will has been executed. This court has invariably condemned instructions which offer the jury an excuse to determine whether a will is a just and proper disposition of the property of the testator."

The trial court also instructed the jury as follows: "The court instructs the jury that although you may believe from the evidence that the signature of the instrument in question is the signature of Charles Avery Hilliard, yet, before you can find that the instrument is his last will and testament you must believe from the evidence that he made said signature at the time and in the manner claimed. In determining this question you should take into consideration his age, his physical condition and all of the circumstances in evidence; and if, after doing so, you believe from the evidence that it was impossible for him to have made the signature at the time claimed, then you should find for the contestant."

This instruction was highly prejudicial and erroneous for many reasons. In the first place, as we have heretofore indicated, there was no issue in the complaint that the testator did not actually sign the will on January 10, 1950, but the only issue was his testamentary capacity at the time the will was executed. In the second place, it singles out certain evidence and omits the testimony of the attesting witnesses to the will. The instruction is further confusing with reference to the statement that the jury should find

for the contestant if they believe from the evidence that it was impossible for him to have made the signature at the time claimed without any evidence whatsoever that there was any such impossibility.

We are unable to agree with the defendants that this case should be reversed without remanding. (*Blackhurst* v. *James*, 304 Ill. 586, 136 N. E. 754.) The evidence for the plaintiff is sufficient to sustain a verdict finding the testator lacked testamentary capacity, and in such state of the record the plaintiff under the statute is entitled to a trial before a jury.

Because of the errors considered, the decree entered herein is reversed and the cause is remanded for a new trial.

Reversed and remanded.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1960.

No. 305.

MARIAN HEIDEMAN,
Petitioner,

vs.

WILLARD KELSEY, as Executor of the Will of CHARLES AVERY HILLIARD, FRANK WYMAN HILLIARD, LEAH HILLIARD and GLADYS H. GATES,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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THE OPINIONS BELOW.

The opinion of the Supreme Court of Illinois of which the Petitioner seeks review is officially reported in its amended and final form at 19 Ill. 2d, Advance Sheet 4, at

op. 258, and is reprinted in full as Appendix I hereof. The opinion submitted by the Petitioner as Appendix I to her Petition is not the amended opinion; however, the difference between the opinions does not appear pertinent to the issues presently before the Court. There are two earlier opinions which appear, respectively, as **Heideman v. Kelsey**, 414 Ill. 453, 111 N. E. 2d 538, and **Heideman v. Kelsey**, 7 Ill. 2d 601, 131 N. E. 2d 531, and which are reprinted in full as Appendix II and III, respectively, to the Petition.

THE QUESTION PRESENTED FOR REVIEW.

After the Supreme Court of Illinois ruled on three occasions that as many jury verdicts in favor of the Petitioner were against the manifest weight of the evidence and finally found that after four successive trials the Petitioner had failed to make her case as strong as when the Court first found it insufficient, did that Court ignore the mandates of the Illinois Constitution, statutes, and common law; and thereby violate the due process clause of the Constitution of the United States, when it refused to remand the case for a fifth trial with the prospect that the same insufficient case would again be presented to a jury and, if another jury favored the Petitioner, the Court would be called upon to repeat the process?

THE FEDERAL CONSTITUTIONAL PROVISIONS AND STATE CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THIS CASE INVOLVES.

Federal Constitutional Provision Involved.

The Fourteenth Amendment to the Constitution of the United States: "... nor shall any state deprive any person of ... property without due process of law."

Illinois Constitutional Provision Involved.

Illinois Constitution of 1870, Article II, Section 5 (Vol. 1, 1959 Illinois Revised Statutes, page 91):

"The right of trial by jury as heretofore enjoyed shall remain inviolate; but the trial of civil cases before Justices of the Peace by a jury of less than 12 men may be authorized by law."

Statutes of Illinois Involved.

1959 Illinois Revised Statutes, Chapter 3, Section 242 (Vol. 1, 1959 Illinois Revised Statutes, page 44):

"Within nine months after the admission to probate of a domestic or foreign will in the probate court of any county of this State, any interested person may file a complaint in the circuit court of the county in which the will was admitted to probate to contest the validity of the will. The right to institute or continue a suit to contest the validity of a will survives and descends to the heir, legatee, devisee, executor, administrator, grantee, or assignee of the person entitled to institute the suit."

1959 Illinois Revised Statutes, Chapter 3, Section 244 (Vol. 1, 1959 Illinois Revised Statutes, Page 44):

"Any party to the suit may demand a trial by jury as in actions at law. An issue at law shall be made whether or not the instrument produced is the will of the testator. The contestant shall in the first instance proceed with proof to establish the invalidity of the will. At the close of the contestant's case, the proponent may present evidence to sustain the will. An authenticated transcript of the testimony of any of the witnesses taken at the time of the hearing on the admission of the will to probate is admissible in evidence."

1959 Illinois Revised Statutes, Chapter 110, Section 92 (3) (b) (Vol. 2, 1959 Illinois Revised Statutes, Page 1063):

"(b) Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case: Provided, that, except as to equitable issues, the Supreme Court shall reexamine cases brought to it by appeal from the Appellate Courts, as to questions of law only."

STATEMENT OF THE CASE

The Petitioner, pursuant to the statutory authority granted by Illinois Revised Statutes, Chapter 3, Section 242, filed a complaint in the Circuit Court of Macoupin County, Illinois, to contest the validity of the last will and testament of Charles Avery Hilliard, deceased. In accordance with the statutory authority granted in Illinois Revised Statutes, Chapter 3, Section 244, the Petitioner asked for a jury trial. The issues tried were whether the decedent possessed testamentary capacity on January 10, 1958, the date inscribed on the will, and whether the testator signed the will on January 10, 1958, or at some later date.

The case has been tried before four juries. Three of the juries determined that the will was invalid. The second jury was unable to reach agreement, which resulted in a mistrial.

The Respondents appealed from the three jury verdicts which found the will to be invalid. In each case, the Supreme Court of Illinois ruled that the jury verdict was against the manifest weight of the evidence and therefore reversed the judgment of the trial courts. On the first two appeals the Illinois Court remanded the cause for new trials. On the third appeal, that of which the Petitioner now seeks review, the Court refused to remand the cause. In their appellant brief to the Supreme Court of Illinois on this appeal (excerpts of which are reprinted as Appendix II hereto) the Respondents specifically requested the Court to reverse without remanding. The Respondents cited **Graham v. Deuterman**, 244 Ill. 124, 91 N. E. 431, which has not at any time overruled and which is, together with the decision from which the Petitioner now seeks relief, the governing law in this type of case in the State of Illinois. The Court said:

"We are reviewing not the first trial, but the fourth. To be sure, this fact has made us increasingly reluctant to set our view of the evidence against that of three juries. But it also makes us increasingly reluctant to remand the cause for another trial with the prospect that we will again be called upon to reverse a jury finding and remand for another trial. The Court recognizes the tendency of juries to look for an excuse to hold invalid a will making an unequal division of the testator's property among his children. (**Turnball v. Butterfield**, 294 Ill. 454; **Freeman v. Easly**, 117 Ill. 317.)' **DeMarco v. McGill**, 402 Ill. 46, 51."

"The plaintiff has had four trials and over eight years in which to produce a convincing case. The resourcefulness of her attorneys in exploring new theories has produced only the unsatisfactory expert testimony of Dr. Smith and of Swett. She has failed to meet or surmount the defendants' strong evidence which shows that the testator could and did handle business affairs and plan the disposition of this property when his will was executed."

"This court faced a similar situation in Graham v. Douterman, 244 Ill. 124. Three juries in three successive trials had there found that the contested document was not the testator's last will and testament because he lacked testamentary capacity. This court reversed decrees entered on the first two verdicts and remanded for new trials on the grounds that the verdicts were against the weight of the evidence. The plaintiff's evidence consisted primarily of non-expert opinions that the testator was not of sound mind and could not transact ordinary business affairs. At the third trial, this evidence was repeated along with new testimony of a doctor, who had seen the testator frequently and had also treated him professionally eight years before his death, that the testator was suffering from senile dementia, or softening of the brain due to old age."

After considering all the evidence, the court concluded that the plaintiff could not be expected to produce any substantial new evidence and that the interests of neither party would be served by again remanding the cause for another new trial.".

"The same is true of the case now before us. It has been demonstrated that the plaintiff cannot produce sufficient evidence to sustain her claim that the testator lacked testamentary capacity, and there is no competent evidence in the record supporting her claim that the contested document was not signed on January 10, 1950, but rather at a later date when the testator was admittedly insane. Another trial would be fruitless and a waste of the court's resources as well as those of the parties. The decree will therefore be reversed" (Final Opinion, App. I, p. 11).

The Federal Question Claimed by the Petitioner.

The Petitioner contends that the Illinois Supreme Court judgment from which she seeks relief denies her due process of law because it contravenes the Illinois Constitution and that the failure to remand for a new trial is not authorized by the Illinois statutes. She also asserts that the decision is erroneous in view of earlier decisions of the Illinois Supreme Court.

The Stage of the Proceedings at Which the Petitioner First Claimed a Violation of the Federal Constitution.

Although the Petitioner was appraised in the Respondents' brief of the precedent which the Illinois Court ultimately followed, it is conceded in her petition (Petition, page 9) that she did not refer to any federal question until she filed her petition for rehearing after the Illinois Supreme Court had rendered its decision.

The Illinois Supreme Court denied the petition for rehearing without opinion.

ARGUMENT

I.

It Affirmatively Appears From the Petition for Writ of Certiorari That No Federal Question Is Involved in This Case.

The Petitioner seeks review on the grounds that the Illinois Supreme Court's refusal to remand this case is not in harmony with the **Illinois** Constitution, the applicable **Illinois** statutes, nor with prior decisions of the **Illinois** Supreme Court. She does not contend that any Illinois Constitutional provision or statute is repugnant to the Federal Constitution, statutes or common law.

According to repeated holdings, the mere fact that in matters involving property a court's decision may depart from precedent, or that it may be erroneous under applicable state laws, does not present a federal question which this Court has jurisdiction to review. **Neblett v. Carpenter**, 305 U. S. 297, 302; **American Railway Exp. Co. v. Kentucky**, 273 U. S. 269, 272; **O'Neil v. Northern Colorado Irrigation Co.**, 242 U. S. 20, 26-7; **West v. Louisiana**, 194 U. S. 258, 261.

The Petitioner complains that Illinois law imposes jurisdictional confines which its court transgressed. But in **Gasquet v. Lapeyre**, 242 U. S. 367, 369, this Court said:

> "... [T]here is nothing in the clauses of the 14th Amendment guaranteeing due process and equal protection which converts an issue respecting the jurisdiction of a state court under the Constitution and statutes of the state anything other than a question of state law, the decision of which by the state court of last resort is binding upon this court."

[1] See *Bell v. Smith*, 293 U. S. 129, 135; *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U. S. 673, 680; *McDonald v. Oregon Short Line R. Co.*, 233 U. S. 665, 671.

And in **Kammerer v. Kroeger**, 299 U. S. 302, 303-4, the Court ruled:

> "We find no basis for the contention that in denying appellants' claim to be paid their counsel fees and expenses out of the assets in the hands of the liquidator, upon the ground that the Court was without jurisdiction to make such an allowance, any right of the appellants under the Federal Constitution has been infringed. The question is one of state practice and remedy. The motions to dismiss the appeals are granted and the appeals are dismissed for the want of a substantial Federal question."

Crediting face value to the Petitioner's claims for the purposes of this discussion, the case she presents has been resolved adversely to her. In **Iowa Central R. Co. v. State of Iowa**, 160 U. S. 389, 394, the Court held that a state court's refusal to grant a jury trial is not a federal question which may be reviewed by the United States Supreme Court, even if it "were clearly erroneous to construe the laws of the state as justifying the refusal."

II.

The Petitioner Did Not Assert a Federal Question in a Proper Manner Nor in Apt Time.

The Supreme Court of the United States will normally not review a cause on certiorari where the federal question was first raised in a petition for rehearing of the state supreme court's decision. **American Surety Co. v. Baldwin**, 287 U. S. 156, 163-4. The Petitioner seeks to excuse her tardiness in this respect by attempting to bring herself within the ambit of the exception that a federal question need not be asserted at an earlier time if the petitioner could not have anticipated the court's ruling.

It is difficult to credit the Petitioner with more than mock seriousness in her claim that she could not have

anticipated that the Illinois Supreme Court would follow one of its unreversed opinions in which the almost identical question was presented, when that opinion was cited to her in the Respondents' brief. She then had the opportunity to inform the Court of the assertion she is now making. In her Petition, it is conceded that she did not. If, as she contends, the Illinois Court was in error, the Petitioner helped lead it astray by her lack of diligence.

In a similar situation, the United States Supreme Court has ruled that a petitioner seeking review is bound to anticipate the possibility of a ruling in his own case similar to that in an earlier appellate case, and must raise the federal question at the earliest opportunity. **Herndon v. Georgia**, 295 U. S. 441, 446. Specifically, the **Herndon** case held that where the federal question was first raised on petition for rehearing of the state court's decision it was untimely.

CONCLUSION.

For the reasons heretofore specified, the Respondents respectfully urge this Court to deny the Petition for Writ of Certiorari to the Supreme Court of Illinois in this case.

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APPENDIX I.

Marian Heideman, Appellee, v. Willard V. Kelsey, Exr., et al., Appellants. 19 Ill. 2d 258.

Mr. Justice Schaefer delivered the opinion of the court:

This is an action to set aside a document, dated January 10, 1950, which had been admitted to probate as the last will and testament of Charles Avery Hilliard. The Plaintiff is Marian Heideman, the only child and sole heir of the testator, who was bequeathed one-sixth of the testator's personal estate under the will. The defendants are Willard V. Kelsey, the executor, and Frank Wyman Hilliard, Leah Hilliard and Gladys H. Gates, the surviving brother and sisters of the testator, who are also beneficiaries under his will. The jury found that the contested document was not the testator's will and the trial court entered a decree on the verdict. The defendants have appealed directly to this court. The testator owned a farm which he devised to his brother and a freehold is involved.

On two previous occasions decrees for the plaintiff in this case have been reversed and the cause has been remanded for a new trial (**Heideman v. Kelsey**, 414 Ill. 453, 7 Ill. 2d 601). Originally the plaintiff charged undue influence and lack of testamentary capacity. At the first trial a verdict was directed for the defendants on the issue of undue influence, and only the issue of testamentary capacity was submitted to the jury, which found for the plaintiff.

On appeal from the decree entered on that verdict, we held that the testimony of Dr. Clark, one of the witnesses for the plaintiff, warranted a submission of the cause to the jury, but that the trial court erred in denying the defendants' motion for a new trial (414 Ill. 453). After a detailed review of the evidence presented on both sides

we concluded, "It is our opinion that the proof in this case demonstrates that Hilliard was a person with adequate testamentary capacity on January 10, 1950, and the jury's verdict finding to the contrary is against the manifest weight of the evidence." 414 Ill. at 466.

At the second trial the jury was unable to agree. At the third trial the jury again found for the plaintiff. On appeal we again reversed and remanded for a new trial (7 Ill. 2d 601). The basis of this reversal was the admission of testimony of a handwriting expert to the effect that the testator's signature on the contested document had not been executed on January 10, 1950. We held that this testimony raised an irrelevant and highly prejudicial issue not encompassed by the pleadings, which had presented only the issue of testamentary capacity. Although we found it unnecessary to set forth all the evidence presented at the third trial in view of this error, we noted that both sides relied on the same testimony used in the first trial and also produced six additional witnesses apiece, and we observed that the "contestant's position is not greatly improved by their added proof." 7 Ill. 2d 601, 604.

Thereafter the plaintiff was given leave to file an amended complaint which included a new count alleging that the contested document was not executed on January 10, 1950, but instead was signed by the testator after April 1, 1950, at which time the testator was insane and without testamentary capacity. The defendants' answer denied the allegations concerning the date of execution of the will, but admitted that "some time after March 1, 1950, and before some time in April, 1950, the mental power, capacity and ability of said deceased became impaired as alleged."

At the trial now before us the issue raised by the new count and the issue of testamentary capacity were submitted to the jury which returned a general verdict for the

plaintiff. In addition, in response to three special interrogatories, the jury found that Charles Avery Hilliard was not possessed of sufficient mental capacity to transact ordinary business on January 10, 1950, and that the document offered as his last will and testament was not executed by him on that date, but instead was signed by Hilliard after April 16, 1950, at a time when it was conceded he was without testamentary capacity.

The testimony of most of the plaintiff's witnesses who testified at the first trial on the issue of testamentary capacity was put before the jury at the present trial, either from the witness stand or by stipulation that their testimony might be read to the jury. Their earlier testimony is summarized in 414 Ill. at 456-459. The plaintiff also offered the testimony of five new witnesses on this issue. Several of them added nothing of substance to the plaintiff's case.

Dr. Joseph Ernst examined the testator on Oct. or 11, 1949, when he was admitted to Deaconess Hospital for treatment of persistent constipation. He had no present recollection of the occurrence, but from the record that he then made he testified on direct examination that the testator was vague as to his past medical history. On cross-examination he testified that the testator was alert and appeared to be a sane man. Dr. Claude Pickrell's testimony at the second and third trials was read to the jury by stipulation. He admitted the testator to Deaconess Hospital in October, 1949, and had also spoken with him several times around January 31, 1950, about the advisability of a hernia operation. He was of the opinion, based on these conversations, that the testator was of sound mind and memory on January 31, 1950. Ben Mariele, the testator's barber, stated his opinion based on his observation of the testator's declining activity and increasing reticence that the testator was not "of as sound a mind"

in 1949 as he was previously. Anne Albro, the plaintiff's only child, testified at length as to the relationship that existed between the testator, her mother and herself, which was one of normal affection. She also testified that she visited the testator in 1946 and that when she next returned from her home in Seattle and visited him in June of 1949 he was more feeble and aged, thin and more stooped, red-eyed and haggard. He did not recognize her $3^3/_4$-year-old-son, whom he had not seen for three years. She "didn't think that he was of sound mind and memory that day."

More important is the testimony of Dr. Groves B. Smith, a physician and surgeon specializing in nervous and mental diseases. In response to a hypothetical question the doctor gave his opinion that the man described in the hypothetical question had advanced arteriosclerotic degeneration, both physical and mental and was not of sound and disposing mind and memory on January 10, 1950. His testimony was in some measure based upon the behavior and medical condition of the hypothetical man, particularly his longstanding and advanced arteriosclerosis. His opinion was also influenced, however, by his conclusion that the man who signed his name in a cramped and jerky manner to the contested document of January 10, 1950, could not have been of sound mind.

This new testimony does not strengthen plaintiff's case upon the issue of testamentary capacity. It was Dr. Ernst's opinion that the testator was alert and was a sane man in October of 1949. Dr. Pickrell testified that the testator was of sound mind on January 31, 1950. The factual foundations upon which Mariele and Anne Albro based their contrary opinions were meager, and so their opinions were of little probative value. Indeed, Mariele's conclusion that in 1949 the testator was not "of as sound a mind as he was before" was of no value in determining the testator's ca-

pacity. Dr. Smith testified on cross-examination that he regarded himself as an advocate. His conclusions were based upon a hypothetical question that omitted many facts that had already been developed, as well as uncontroverted facts later developed by the defendants' evidence which tended to establish the testator's testamentary capacity during the period in which he signed the will. And his assertion that the testator's mental capacity could be determined by an examination of his signature on the contested document must be weighed against the subsequent testimony of Dr. Val Satterfield, a distinguished psychiatrist, that there is no relation, in medicine and psychiatry, between the handwriting of a person and his mental condition.

Dr. Clark was the witness whose testimony at the first trial was held to be sufficient, standing alone, to prevent a directed verdict for defendant. His testimony then is difficult to reconcile with his testimony at the present trial. At the first trial he testified that the testator suffered from brain disease caused by arteriosclerosis, or hardening of the arteries. At the present trial he testified that there had been a change in medical opinion during the intervening years; and although he testified that the testator "had a mental condition," he was unable to say that it was caused by arteriosclerosis. At the first trial he testified that the testator did not have senile dementia (414 Ill. at 456). At the present trial he testified that in 1948 the testator suffered from early senile dementia. On cross-examination he enumerated the "classical symptoms" of senile dementia, but he was not able to associate these classical symptoms with significant conduct of the testator.

For reasons that will be stated, it is not necessary to determine whether or not the testimony of Dr. Smith and Dr. Clark at the present trial was sufficient to establish a prima facie case for the plaintiff on the issue of testamentary capacity.

While the plaintiff did not notably strengthen her case in this retrial of the testamentary capacity issue, the defendants did. They introduced in evidence additional letters regarding his will which the testator wrote to his lawyer during the latter part of 1949 and in January, 1950. These letters, with those previously introduced at the earlier trial, show that the testator at that time was able to and did in fact deliberate at length and with understanding upon the problems of drafting a will. The defendants also offered testimony of the lawyer's secretary to show that the contested document incorporated the plan developed in this correspondence. In addition, they offered additional testimony tending to show that the testator retained the capacity to understand and manage his business affairs when the will was signed. Although we are reluctant to disturb findings in which three juries have concurred, we must conclude that the jury's determination that the testator lacked testamentary capacity is against the manifest weight of the evidence and can not stand.

The only evidence supporting the plaintiff's contention that the contested document was not signed on January 10, 1950, but rather at some time after April 1, 1950, when the testator was admittedly incompetent, is the testimony of George Swett, a handwriting expert, and of Dr. Smith. Swett testified that in his opinion the testator's signatures on page one and page two of the contested document were executed at a time closer to April 25, 1950, than to January 10, 1950. He reached this conclusion (1) by a comparison of the signature on page one, first with seven checks written by the testator in January and then with a letter written on April 25 by the testator, and (2) by a comparison of the signature on the second page with the letter of April 25 and with the signature on the first page. Dr. Smith testified that from an inspection of signatures he was able to state that the signatures on the will were made by a person who was physically and mentally incapable of writing a legible signature, and by one who was

not competent to understand what he was signing. He also testified that in his opinion the signatures on the will were placed there at a time much closer to April 25 than to January 10.

In **Jones v. Jones**, 406 Ill. 448, 450, this court held that expert testimony can not be allowed to prevail over the uncontradicted and unimpeached testimony of two disinterested attesting witnesses. This rule of priority for one form of testimony over another has been criticized. (McCormick on Evidence, sec. 173, n. 15.) It is unnecessary to reiterate that broad holding in this case. The proposition advanced by the witnesses are sufficiently startling to warrant scrutiny of the methods they employed, and their testimony can not survive that scrutiny.

The choice of signature specimens to be used for comparison was made by Swett. He used only seven out of 28 checks written by the testator between October, 1949, and February, 1950, which the plaintiff had submitted to him and which were placed in evidence. In arriving at his opinion he took no account of other uncontroverted samples of the testator's handwriting executed during the period in controversy. If his theory was one of progressive deterioration in handwriting, as it seems to have been, a fair analysis of those earlier writings which showed characteristics similar to those manifested in the letter of April 25 was obviously required. A conclusion based on only a portion of the specimens available is at best meaningless and at worst highly prejudicial. We conclude that Swett's testimony was not competent evidence and was improperly admitted.

What we have said applies equally to the testimony of Dr. Smith that the contested document was executed nearer to April 25 than to January 10. He, too, failed to take into account handwriting specimens that were inconsistent with his hypothesis. He advanced no medical authority to support his proposition that it is possible to

determine the mental competence of one who signs a will, or the date of its execution, by inspecting comparative signatures years after the event. Without the testimony of Swett and Dr. Smith, there was no evidence to support the plaintiff's charge that the contested document was not executed on January 10, 1950, and a verdict should have been directed for the defendants on that issue.

The defendants urge us to reverse without remanding for a new trial. We rejected the same contention on review of the first trial on the ground that Dr. Clark's testimony established a prima facie case which warranted submission to the jury. Dr. Clark's testimony at the present trial is difficult to reconcile with his earlier testimony, and he seems to have disclaimed his earlier opinion as to the testator's lack of ability to handle his business affairs when he testified, "I do not know of any basis for me to determine how he was doing with respect to his business affairs." His testimony alone is no longer sufficient, but even if it could be regarded, when coupled with that of Dr. Smith, as establishing a prima facie case, we are of the opinion that the cause should not be remanded.

We are reviewing not the first trial, but the fourth. To be sure, this fact has made us increasingly reluctant to set our view of the evidence against that of three juries. But it also makes us increasingly reluctant to remand the cause for another trial with the prospect that we will again be called upon to reverse a jury finding and remand for another trial. "This court recognizes the tendency of juries to look for an excuse to hold invalid a will making an unequal division of the testator's property among his children. (**Turnball v. Butterfield**, 304 Ill. 454; **Freeman v. Easly**, 117 Ill. 317.)" **DeMarco v. McGill**, 402 Ill. 46, 51.

The plaintiff has had four trials and over eight years in which to produce a convincing case. The resourceful-

ness of her attorneys in exploring new theories has produced only the unsatisfactory expert testimony of Dr Smith and of Swett. She has failed to meet or surmount the defendants' strong evidence which shows that the testator could and did handle business affairs and plan the disposition of this property when his will was executed.

This court faced a similar situation in **Graham v. Deuterman**, 244 Ill. 124. Three juries in three successive trials had there found that the contested document was not the testator's last will and testament because he lacked testamentary capacity. This court reversed decrees entered on the first two verdicts and remanded for new trials on the grounds that the verdicts were against the weight of the evidence. The plaintiff's evidence consisted primarily of nonexpert opinions that the testator was not of sound mind and could not transact ordinary business affairs. At the third trial, this evidence was repeated along with new testimony of a doctor, who had seen the testator frequently and had also treated him professionally eight years before his death, that the testator was suffering from senile dementia, or softening of the brain due to old age. After considering all the evidence, the court concluded that the plaintiff could not be expected to produce any substantial new evidence and that the interests of neither party would be served by again remanding the cause for another new trial.

The same is true of the case now before us. It has been demonstrated that the plaintiff cannot produce sufficient evidence to sustain her claim that the testator lacked testamentary capacity, and there is no competent evidence in the record supporting her claim that the contested document was not signed on January 10, 1950, but rather at a later date when the testator was admittedly insane. Another trial would be fruitless and a waste of the court's resources as well as those of the parties. The decree will therefore be reversed.

APPENDIX II.

Marian Heideman, Plaintiff-Appellee vs. Willard V. Kelsey, as Executor of the Will of Charles Avery Hilliard, Frank Wyman Hilliard, Leah Hilliard and Gladys H. Gates, Defendants-Appellants, Case No. 35,104, in the Supreme Court of Illinois, May Term, A. D., 1959. Appeal from the Circuit Court of Macoupin County, Illinois.

Excerpts From:

Statement, Brief and Argument for Defendants-Appellants.

II.

Points and Authorities.[1]

I (C)

The Decree Is Against the Manifest Weight of the Evidence.

A decree setting aside a will upon the ground of want of testamentary capacity must be reversed where, assuming that everything testified to by the contestant's witnesses is true, the evidence is wholly insufficient to overcome the undisputed facts proved by the proponents of the will.

Graham v. Deuterman, 244 Ill. 124, 128.

On a motion for new trial the court may weigh the evidence for the purpose of determining whether the ver-

[1] Statement, Brief and Argument for Defendants-Appellants, pp. 11-12.

dict is contrary to the weight of the evidence, and, if the court so finds, a new trial should be granted.

Heideman v. Kelsey, 414 Ill. 433, 446;
Hunt v. Vermillion County Children's Home, 381 Ill. 29, 34.

If the verdict of the jury finding the maker of a will sane or insane is against the clear weight and preponderance of the evidence the court should set aside the verdict, even though the evidence of one side, considered alone, would be sufficient to sustain the decree.

If a reviewing court has reversed prior decrees based on jury verdicts finding a lack of testamentary capacity as against the manifest weight of the evidence, and on a subsequent appeal the contestant has still adduced no substantially new evidence, the reviewing court on the later appeal may terminate the litigation and reverse without remanding.

Graham v. Deuterman, 244 Ill. 124, 129;
Crumbaugh v. Owen, 238 Ill. 497, 509.

Argument.

I (C).

The Plaintiff has been afforded three opportunities to accumulate and produce any evidence contradicting the Testator's possession of testamentary capacity. The lack of competency and the unworthy probative value ascribable to this Plaintiff's additional evidence indicates the non-existence of any evidence to even form an issue. Every opportunity has been extended to the Plaintiff to improve her case. Ingenious but uncredible newness has been added on each occasion. If the first decree was against the manifest weight of the evidence, then this decree is more than

ever against the manifest weight of the evidence. In such a case a decree in this Court, after the Plaintiff has had three occasions to overcome the Defendants' evidence, should be entered upholding the Will. Graham v. Deuterman, 244 Ill. 124, 129; Crumbaugh v. Owen, 238 Ill. 497, 509.[2]

IV.

Conclusion.

We respectfully submit that the decree of the Trial Court should be vacated and that a decree finding the proposed instrument to be the Last Will and Testament of Charles Avery Hilliard ordered entered by this Court. In the alternative, we ask that a new trial be granted, with directions that the Defendants have their cause tried by a jury informed of the Testator's gift to the Plaintiff of stock securities and cash made between December 1, 1949, and January 10, 1950.[3]

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[2] Ibid., pp. 55-6

[3] Ibid., p. 74.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960.

No. 305

MARIAN HEIDEMAN,

Petitioner,

vs.

WILLARD V. KELSEY, as Executor of the Will of CHARLES AVERY HILLIARD, FRANK WYMAN HILLIARD, LEAH HILLIARD and GLADYS H. GATES,

Respondents.

PETITIONER'S BRIEF IN REPLY TO BRIEF IN OPPOSITION TO CERTIORARI.

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CHAMPLIN-SHEALY COMPANY, CHICAGO

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Respondents.

PETITIONER'S BRIEF IN REPLY TO BRIEF IN OPPOSITION TO CERTIORARI.

I.

THE PETITION FOR CERTIORARI PRESENTS ONLY A QUESTION OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT. IT PRESENTS NO QUESTION OF STATE CONSTITUTIONAL OR OTHER STATE LAW.

Respondents first impute to petitioner an argument that petitioner does not make and then replies to that argument.

Petitioner does not suggest, much less does she contend, that the Supreme Court of Illinois has violated any provision of Illinois' constitution

On the complete contrary, petitioner has demonstrated that Illinois' Supreme Court *fastidiously observed* and *scrupulously obeyed* Illinois' constitutional provisions that inhibit Illinois' courts of review, including her Supreme Court, from making findings of fact contrary to the verdict of a jury where there is sufficient evidence to take the case to a jury.

Nor does petitioner intimate, much less does she argue, that Illinois' Supreme Court denied her due process of law because that court departed from precedent.

What petitioner does contend and demonstrate is that she is entitled to a final finding of fact *either* from a jury *or* from a chancellor in a trial court *or* from the Supreme Court of Illinois and that she has had no such finding by any tribunal; for the jury's verdict and the decree of the trial court have been set aside but have not been superseded by any finding of the Supreme Court of Illinois.

Illinois' courts of review claim and regularly exercise the right to substitute their findings for those of a lower court in non-jury cases even though the evidence is conflicting and the lower court saw and heard the witnesses. There is nothing unconstitutional about this practice in non-jury cases even though it differs from the Federal practice.

Nor would there be the slightest tenable Federal constitutional objection to an Illinois rule that permitted reviewing court's finally to substitute their findings for those of a jury, even on disputed questions of fact, *if there were any*

such rule in Illinois. There is no Federal constitutional right to a trial by jury in any State case.

But there is no such rule and respondents do not suggest that there is.

The result is the petitioner has been denied her claims to her father's estate *with no findings against her whatever.*

It is of this *want* of findings, not of findings against her that have never been made, that she complains as denying her due process.

II.

PETITIONER MADE TIMELY ASSERTION OF HER CLAIMS OF FEDERAL CONSTITUTIONAL RIGHT.

Respondents suggest that petitioner should have claimed some Federal constitutional right at some stage earlier than in her petition for rehearing.

Ordinarily a claim of Federal constitutional right must be raised before, not after, judgment.

But in the third opinion of the Supreme Court of Illinois, that court had held that petitioner's case entitled her to the suffrage of a jury. She could not anticipate that the court would repudiate the "law of the case" on its fourth opinion.

She could and did anticipate that the Supreme Court of Illinois would hold that on her fourth trial she had introduced no evidence raising a question of fact. She addressed this contention in her briefs. But she could not foresee that the Supreme Court of Illinois would hold that there was a question for a jury, as it did hold, and then deny her a jury's verdict without making any independent findings of its own.

It is therefore respectfully submitted that certiorari should be granted.

Respectfully submitted,

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